



**BILLING CODE: 3510-22-P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**RIN 0648-XG694**

**Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to the U.S. Navy Training and Testing Activities in the Atlantic Fleet Training and Testing Study Area**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice; receipt of application and request for Letters of Authorization extension; request for comments and information.

**SUMMARY:** NMFS has received a request from the U.S. Navy (Navy) to amend NMFS' Marine Mammal Protection Act (MMPA) regulations authorizing the take of marine mammals incidental to Navy training and testing activities conducted in the Atlantic Fleet Training and Testing (AFTT) Study Area from November 2018 to November 2023 to cover seven years of the Navy's activities, instead of five. Section 316 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (2019 NDAA), signed into law on August 13, 2018, amended the MMPA to extend the maximum period for MMPA incidental take regulations under section 101(a)(5)(A) from five to seven years for military readiness activities. The Navy's activities qualify as military readiness activities pursuant to the MMPA, as amended by the NDAA for Fiscal Year 2004. The Navy proposes no changes to their specified activities, mitigation measures, monitoring, or reporting and requests that NMFS amend the final rule issued on November 14, 2018, to authorize incidental take of marine mammals for the two

additional years now allowed under the statute. NMFS invites the public to provide information, suggestions, and comments on the Navy's application.

**DATES:** Comments and information must be received no later than *[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]*.

**ADDRESSES:** Comments on the application should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Physical comments should be sent to 1315 East-West Highway, Silver Spring, MD 20910 and electronic comments should be sent to *ITP.Piniak@noaa.gov*.

*Instructions:* NMFS is not responsible for information or comments sent by any other method, to any other address or individual, or received after the end of the comment period. Information and comments received electronically, including all attachments, must not exceed a 25-megabyte file size. Attachments to electronic comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All information and comments received are a part of the public record and will generally be posted online at

*<https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>* without change. All personal identifying information (*e.g.*, name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

**FOR FURTHER INFORMATION CONTACT:** Wendy Piniak, Office of Protected Resources, NMFS, (301) 427-8401. An electronic copy of the Navy's application may be obtained online at: *<https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities>*. In case of problems accessing these documents, please call the contact listed above.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An incidental take authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring, and reporting of such takings are set forth.

NMFS has defined “negligible impact” in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The MMPA states that the term “take” means to harass, hunt, capture, kill or attempt to harass, hunt, capture, or kill any marine mammal. The 2004 NDAA (Public Law No. 108-136) amended the MMPA to remove the “small numbers” and “specified geographical region” limitations for military readiness activities. It also amended the definition of “harassment” as it applies to military readiness activities to read as follows (Section 3(18)(B) of the MMPA): (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) Any act that disturbs or is likely to

disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered (Level B harassment).

On August 13, 2018, the 2019 NDAA (Public Law No. 115-232) amended the MMPA to allow incidental take regulations for military readiness activities to be issued for up to seven years.

### **Summary of Request**

On November 16, 2018, NMFS received an adequate and complete application from the Navy requesting an amendment of the regulations published on November 14, 2018, that authorize the take of marine mammals incidental to the Navy's training and testing activities in the AFTT Study Area (83 FR 57076). Specifically, the activities include training and testing (all categorized as military readiness activities) including the use of active acoustic sonar systems and other transducers, in-water detonations, air guns, construction activities involving pile removal and installation, and the operation of a fleet of vessels throughout the AFTT Study Area. These activities may result in the incidental take of marine mammals in the form of Level B harassment (behavioral disruption or temporary hearing impairment), Level A harassment (permanent hearing impairment or tissue damage), or serious injury or mortality in a very small number of cases. The requested amendment would change the expiration date of the regulations from November 13, 2023 to November 13, 2025, allowing for seven total years of validity, as allowed under the MMPA as recently amended by the 2019 NDAA.

### **Description of Amendment**

The Navy proposes that NMFS amend the existing AFTT regulations and associated Letters of Authorization (LOAs) such that they would cover incidental take caused by seven years of training and testing activities instead of five, extending the expiration date from November 13, 2023 to November 13, 2025. The amendment would be conducted through a proposed and final rulemaking, consistent with the requirements of section 101(a)(5)(A). The Navy has not proposed any changes to the nature of the specified activities and, therefore, the boundaries of the AFTT Study Area, the training and testing activities (e.g., equipment and sources used, exercises conducted), and the mitigation, monitoring, and reporting measures are identical to those described and analyzed in the existing AFTT regulations published on November 14, 2018 (83 FR 57076).

The only changes contemplated in the extension of the regulations are those necessary to identify the appropriate type and amount of incidental take to authorize in the two additional years that the amended regulations would cover, and determine whether the incidental take would have a negligible impact on the affected species and stocks.

The current AFTT rule authorizes three serious injuries or mortalities from vessel strike. The Navy's request for an amendment includes a revised vessel strike analysis encompassing seven years of activities versus the five years addressed in the analysis supporting the mortality estimate in the current LOAs. Based on the revised analysis, the Navy requests one additional large whale mortality bringing the total from three vessel strikes over five years to four vessel strikes over seven years. The large whale stocks that are proposed to be lethally taken by vessel strike are the same as those included in the current AFTT rule. Please see Chapter 6, Section 6.2 of the Navy's application for a full description of the incidental take by vessel strike.

Regarding the quantification of expected takes from acoustic and explosive sources (by Level A and Level B harassment, as well as mortality resulting from exposure to explosives), the number of takes are based directly on the level of activities (days, hours, counts, etc., of different activities and events) in a given year. In the existing AFTT rule, the Navy bases their take estimates across the five-year rule on conducting three years of a nominal (average) level of activity and two years of a maximum level of activity. For the amended seven year rule, the Navy proposes to add one additional nominal year and one additional maximum year to determine the predicted take numbers. Specifically, as in the current rule, the Navy proposes to use the maximum annual level to calculate annual takes (which will remain identical to the current rule), and the sum of all years (four nominal and three maximum, in the case of the new amended rule) to calculate the seven-year totals. Please see Chapter 6, Section 6.1 of the Navy's application for a description of the proposed take from acoustic and explosive sources.

As noted above, the proposed amendment of the rule would include mitigation, monitoring, and reporting measures that are identical to those included in the current final rule (83 FR 57076, November 14, 2018). In summary, mitigation would include: (1) the use of Lookouts to observe for biological resources and communicate the need for mitigation implementation; (2) powerdowns, shutdowns, and delay of starts to avoid exposure of marine mammals to high levels of sound or explosive blasts more likely to result in injury or more serious behavioral disruption; (3) limiting the use of active sonar or explosives in certain biologically important areas to reduce the probability or severity of impacts when they are more likely to contribute to fitness impacts, and (4) broadcasting awareness notification messages to all of the vessels in an area to reduce the likelihood of vessel strike. Please see Chapter 11 of the

Navy's application for a full description of the proposed mitigation, which is identical to that required under the existing rule.

The Navy proposes to continue forward the implementation of the robust Integrated Comprehensive Monitoring Program and Strategic Planning Process outlined in the current regulations. The Navy's monitoring strategy, currently required by the AFTT regulations, is well-designed to work across Navy ranges to help better understand the impacts of the Navy's activities on marine mammals and their habitat by focusing on learning more about marine mammal occurrence in different areas and exposure to Navy stressors, marine mammal responses to different sound sources, and the consequences of those exposures and responses on marine mammal populations. Similarly, the proposed amended regulations would include identical adaptive management provisions and reporting requirements as the existing regulations. Please refer to Chapter 13 of the Navy's application for full details on the monitoring and reporting proposed by the Navy.

### **Information Solicited**

Interested persons may submit information, suggestions, and comments concerning the Navy's request (see **ADDRESSES**). NMFS will consider all information, suggestions, and comments related to the request during the development of proposed regulations governing the incidental taking of marine mammals by the Navy, if appropriate.

Dated: December 18, 2018.

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Donna S. Wieting,

Director, Office of Protected Resources,

National Marine Fisheries Service.

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